SUPPLEMENTARY INFORMATION: In the Matter of H & R Block, Inc., a corporation. Codification appearing at 37 FR 6663 remains unchanged.

List of Subjects in 16 CFR Part 13

Tax return preparation service.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)

Commissioners: James C. Miller III, Chairman, David A. Clanton, Michael Pertschuk, Patricia P. Bailey.

In the matter of H & R Block, Inc., a corporation, Docket No. C-2162.

Order Reopening the Proceeding and Granting Request To Modify Order

On January 22, 1982, H & R Block Inc., the petitioner, filed a Request to Reopen Proceedings under Section 2.51 of the Commission's Rules of Practice. Block sought to set aside paragraphs 5 and 6 of a March 1, 1972, order against the company. On June 8, 1982, Block filed a Supplement to Modification of Request to Reopen Proceedings, seeking modification of the Order paragraphs instead of their elimination. The Order paragraphs prohibit Block from using information obtained from a customer for any purpose other than the preparation of tax returns unless, prior to obtaining any information from the customer, Block obtains the customer's written consent. The consent form used must disclose: (1) The exact information to be used, (2) the particular use to be made of such information, (3) and a description of the parties or entities to whom the informatiion may be made available.

The petitioner contends that enactment of Section 7216 of the Internal Revenue Code, 26 U.S.C. 7216, on December 10, 1971, effective January 1, 1972, and adoption by the Internal Revenue Service of regulations 301.7216-1 through 301.7216-3 on March 24, 1974, constitute a change of the law warranting reopening the proceeding and modifying paragraphs 5 and 6 of the Commission's Order. Regulation 301.7216-3 reads in pertinent parts:

Disclosure or use only with formal consent of taxpayer.—(a) Written consent to use or disclosure—(1) Solicitation of other business. (i) If a tax return preparer has obtained from the taxpayer a consent described in paragraph (b) of this section, he may use the tax return information of such taxpayer to solicit from the taxpayer any additional current business, in matters not related to the Internal Revenue Service, which the tax return preparer provides and offers to the public. The request for such consent may not be made later than the time the taxpayer receives his completed tax return from the tax return preparer. If the request is not granted, no follow up request may be made. This authorization to use tax return information of the taxpayer does not apply, however, for purposes of facilitating the solicitation of the taxpayer's use of any services or facilities furnished by a person other than the tax return preparer, unless such other person and the tax return preparer are members of the same affiliated group within the meaning of section 1504. Thus, for example, the authorization would not apply if the person is a corporation which is owned or controlled directly or indirectly by the same interests which own or control the tax return preparer but which is not affiliated with the tax return preparer within the meaning of section 1504(a). Moreover, this authorization does not apply for purposes of facilitating the solicitation of additional business to be furnished at some indefinite time in the future, as, for example, the future sale of mutual fund shares or life insurance, or the furnishing of future credit card services. It is not necessary, however, that the additional business be furnished in the same locality in which the tax return information is furnished.

* * * * *

(2) Permissible disclosures to third parties. If a tax return preparer has obtained from a taxpayer a consent described in paragraph (b) of this section, he may disclose the tax return information of such taxpayer to such third persons as the taxpayer may direct. However, see § 301.7216-2 for certain permissible disclosures without formal written consent.

* * * * *

(b) Form of consent. A separate written consent, signed by the taxpayer or his duly authorized agent or fiduciary, must be obtained for each separate use or disclosure authorized in paragraph (a) (1), (2), or (3) of this section and shall contain—

(1) The name of the tax return preparer,

(2) The name of the taxpayer,

(3) The purpose for which the consent is being furnished,

(4) The date on which such consent is signed,

(5) A statement that the tax return information may not be disclosed or used by the tax return preparer for any purpose (not otherwise permitted under § 301.7216-2) other than that stated in the consent, and

(6) A statement by the taxpayer, or his agent or fiduciary, that he consents to the disclosure or use of such information for the purpose described in paragraph (b)(3) of this section.

The Commission has considered these developments and concluded that the public interest warrants its reopening the proceeding and modifying the order substantially as requested by petitioner. Section 7216 of the Code and the regulations promulgated thereunder constitute a comprehensive scheme for regulating the use by tax preparers of information obtained from customers. The Commission believes that this scheme is adequate to prevent the misuse of confidential information by petitioner in the future. The additional requirements of the Commission's Order, which mandate more disclosures and require that consent be obtained earlier from the customer, are not inconsistent with the regulatory scheme. However, they do impose an additional burden on respondent that the Commission has concluded is unnecessary. Accordingly,

It Is Ordered that paragraphs 5 and 6 of the Order be modified by the substitution of the following new paragraph:

5. Using or disclosing any information concerning any customer of respondent, including the name and address of the customer, obtained as a result of the preparation of the customer's tax return, for any purpose which is not essential or necessary to the preparation of said tax return, except as specifically authorized by Section 7216 of the Internal Revenue Code and the regulations promulgated thereunder or by future amendments thereto.

By direction of the Commission.

Issued: November 2, 1982.

Carol M. Thomas,

Secretary.

[FR Doc. 82-32463 Filed 11-24-82; 8:45 am]

BILLING CODE 6750-01-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 211

[Release Nos. 33-6436; 34-19257; 35-22716; IC-12826; FR-6]

Interpretive Release About Disclosure Considerations Relating to Foreign Operations and Foreign Currency Translation Effects

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation.

SUMMARY: In this release the Commission suggests that information as to the nature of a registrant's foreign operations gained as a result of implementing a new accounting standard for foreign currency translation issued by the Financial Accounting Standards Board ("FASB") could, in many cases, be used to develop improved disclosures relating to foreign operations and foreign currency translation effects. Therefore, the Commission encourages voluntary experimentation with meaningful disclosures in this regard. The release also addresses disclosure considerations related to the new standard's transition provisions.

FOR FURTHER INFORMATION CONTACT: Robert K. Herdman (202-272-2141) or Edmund Coulson (202-272-2130), Office of the Chief Accountant, or Howard P. Hodges (202-272-2553), Division of Corporation Finance, Securities and Exchange Commission, 450 5th Street, NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION:

Background and Discussion

As a result of considerable controversy and criticism related to its Statement of Financial Accounting Standards ("SFAS") No. 8, "Accounting for the Translation of Foreign Currency Transactions and Foreign Currency Financial Statements," the FASB, in January 1979, added a project to its agenda to reconsider accounting for foreign currency translation. That project turned out to be the most complex and controversial issue faced by the FASB to date. In December 1981, after almost three years of extensive proceedings, the FASB issued SFAS No. 52, "Foreign Currency Translation," which replaces SFAS No. 8. The new standard is effective for fiscal years beginning on or after December 15, 1982, although earlier application is encouraged. In fact, many companies adopted the standard for their 1981 financial statements and many more are expected to do so in 1982.

SFAS No. 52 embraces a methodology different from that of the previous standard and may significantly impact multinational corporations. SFAS No. 52 is also significant in that it represents a very broad, rather then a prescriptive, standard. It sets forth objectives and provides guidelines to be used by managements in meeting those objectives. The standard is designed to (1) provide information that is generally compatible with the expected economic effects of a rate change on an enterprise's cash flows and equity and (2) reflect in consolidated statements the financial results and relationships as measured in the primary currencies in which the individual entities conduct their businesses (i.e., the "functional currencies").[1]

The standard requires the exercise of management judgment in assessing the facts and circumstances of particular situations and applying the guidelines to those facts and circumstances. The principal determination involves the selection of the appropriate functional currency for each of a company's foreign operations.[2] The functional currency guidelines provided by the standard address indicators of the foreign operations' cash flows, sales prices and markets, expenses, financing, and intercompany transactions and arrangements. While application of these guidelines may result in a relatively clear determination in many cases, others will be more difficult. In such cases, the FASB stated that the economic facts and circumstances pertaining to a particular foreign operation shall be assessed in relation to the FASB's stated objectives for foreign currency translation.

Although a broad standard of this type carries with it the risk of decreasing the comparability of reporting financial information, it is clear that there may be significant differences in the nature of foreign operations both within a particular company and among companies, even those within the same industry.[3] The new standard gives managements the necessary flexibility to appropriately match reported accounting results with economic facts and circumstances. Ultimately, however, the success of SFAS No. 52 (and the usefulness of the concept of broad standards of financial reporting in general) depends on the confidence of the investment community in its application which in turn is heavily dependent on the quality of related disclosures.

SFAS No. 52 requires disclosure of the aggregate transaction gain or loss included in determining net income and an analysis of the changes during the period in the separate component of equity for cumulative translation adjustments. SFAS No. 52 also states that it may be necessary to disclose significant rate changes occurring after the date of the enterprise's financial statements or after the date of the foreign currency statements of a foreign entity (if different), and their effect on unsettled balances pertaining to foreign currency transactions. In addition, the FASB encouraged management to supplement the disclosures required by SFAS No. 52 with an analysis and discussion of the effects of rate changes on the reported results of operations. The FASB stated that the purpose of such supplemental disclosures is to assist financial report users in understanding the broader economic implications of rate changes and to compare recent results with those of prior periods.[4] The FASB considered requiring disclosure that would describe and possibly quantify the effects of rate changes on reported revenues and earnings, but decided not to, primarily because of the wide variety of potential effects, the perceived difficulties of developing the information, and the impracticality of providing meaningful guidelines.[5]

1. Disclosure Considerations

In a review of a sample of annual reports of registrants who adopted SFAS No. 52 for their 1981 financial statements, the Commission's staff observed compliance with the specific disclosure requirements as well as certain voluntary supplemental disclosures of the type encouraged by the Board.[6] While SFAS No. 52 does not require disclosure as to a company's functional currencies or the extent to which foreign operations are measured in a currency other than the reporting currency, most companies disclosed (either explicitly or by implication) that either "all" or "most" of their foreign operations were measured in the local currency. Frequently, it was disclosed that exceptions were made for operations in high inflation countries (in some cases specific countries were named). A significant number of companies, however, only stated that "certain" operations were measured in a local currency or provided no disclosure as to the extent of foreign operations so measured. Some companies disclosed that the related translation adjustments

[1] An entity's functional currency is the currency of the primary economic environment in which the entity operates; normally that is the currency in which an entity primarily generates and expends cash. (Para. 5, SFAS 52)

[2] This determination can have a significant impact on reported financial results. The functional currency approach which SFAS No. 52 imposes differentiates between those operations that are relatively self-contained and integrated within a foreign country and those that are an exension of the parent's domestic operations. It concludes that "translation adjustments" (which result from consolidating the former) are related to the parent company's net investment in those operations and have no immediate, direct impact on the parent's cash flows. Therefore, those adjustments are not included in determining net income for the period but are presented as part of consolidated stockholders' equity until the parent's investment in that operation is sold or liquidated. "Transaction gains and losses" (which result from the consolidation of all other foreign operations, as well as most other foreign currency transactions) are accounted for and reported in net income, as was the case under SFAS No. 8.

[3] Because of the nature of the standard and the complexity of the issues involved, the FASB has formed an implementation group to advise its staff of possible implementation problems. The Commission believes that it is important to identify and deal with implementation problems by providing timely guidance where necessary or appropriate.

[4] Paragraph 144, SFAS No. 52.

[5] Ibid.

[6] In 1981, the dollar significantly strengthened against many major foreign currencies and thus frequently had a depressing effect on reported sales and operations. Many companies in the staff's sample referred to the effect of the strong dollar. A significant number quantified the effect on sales; some also provided a quantification of the effect on operating results. A few companies discussed their foreign operating results as reflected in the local currency, with the effects of translation noted. Other disclosures included the effects of exchange rate changes on backlog, interest expense, wages, cost of raw material purchased from the parent, transactions between subsidiaries, inventory levels, debt to equity ratio, working capital, effective tax rate, and cost of sales. The Commission encourages continuing experimentation by individual registrants in an effort to achieve meaningful disclosures in this area.

did not impact cash flow or were unrealized.

The Commission believes that information as to the nature of a registrant's foreign operations gained as a result of implementing SFAS No. 52 [7] could be used to develop improved disclosures relating to foreign operations and foreign currency translation effects, including information as to functional currencies. Such disclosures could provide meaningful information to investors and others who are attempting to understand the impact of a registrant's foreign operations on the financial statements. Segment disclosures provide information about the nature and extent of a company's foreign operations, but the standards inherent in SFAS No. 52 are premised on the fact that there may be significant differences in economic substance among various foreign operations—i.e., different exposure to exchange rate risk and different impact on cash flow, with resulting different accounting treatment. The Commission recognizes that this is a complex area and, thus, is not specifying the location [8] or nature of the particular disclosures to be made. Indeed, information such as a display of net investments by major functional currency or an analysis of the translation component of equity (either by significant functional currency or by geographical areas used for segment disclosure purposes) will not always be practicable. Nevertheless, the Commission encourages experimentation with narrative information, such as disclosure about the functional currencies used to measure significant foreign operations or the degree of exposure to exchange rate risks (which exists for all companies engaged in foreign operations, regardless of their functional currencies), in order to enable investors to assess the impact of exchange rate changes on the reporting entity.[9]

There follows a discussion of two specific situations which registrants may wish to explain to investors. When a registrant determines that the financial data of significant foreign operations should be measured in other than the reporting currency, there may be an indication that all or some of those operations' cash flows are generally not available to meet the company's other short-term needs for cash. Thus, it may be appropriate that such a registrant discuss those operations in a disaggregated manner in order to meaningfully address liquidity and capital resource considerations.[10] A discussion of the company's intracompany financing practices may also be meaningful in this regard. Of course, if those foreign cash flows are generally available to meet the parent's cash needs and the local functional currency determinations result from a preponderance of the other evaluative factors specified by SFAS No. 52, discussion of that fact would facilitate understanding of the registrant's operations.

Another example relates to significant foreign operations in highly inflationary economies. In SFAS No. 52, the FASB adopted a pragmatic solution to the problems resulting from the lack of a stable measuring unit (i.e, those operations' financial data must be measured in the reporting currency). As a result, the translation effects of rate changes are included in net income even through the operations may be relatively self-contained or have other environmental characteristics such that remittances to the parent are unlikely.[11] In such cases, discussion only of consolidated, or even reporting currency, liquidity and capital resources may not be sufficient.

2. Disclosures During the Transition Period

Adoption of SFAS No. 52 is mandatory for fiscal years beginning on or after December 15, 1982, with earlier application encouraged. The financial statements for prior years may be restated to conform to the new standard and, if not restated, companies may present disclosure of earnings data for the prior year computed on a pro forma basis. Companies that adopted the standard for fiscal years ending on or before March 31, 1982 were required to disclose the effect of adopting the new standard on earnings data for the year of the change in order to provide comparability with companies still using SFAS No. 8; that disclosure is not required for fiscal years ending after that date.

The Board determined that the extended mandatory effective date was appropriate to provide sufficient time for companies to make any desired changes in financial policies that might be prompted by the new standard and to prepare internally for the implementation of the standard. The Board did not require restatement because it recognized that the accounting exposure determined in accordance with SFAS No. 8 had been hedged by the management of some companies and that different management actions might have been taken if SFAS No. 8 had not been in effect. Finally, the Board did not extend the requirement to disclose the effect of adopting the standard to years ending after March 31, 1982 because it believed that many companies will have terminated some or all hedges of the SFAS No. 8 accounting exposure, thereby making any meaningful determination of the effect virtually impossible. In addition, the Board believed that the cost of requiring two systems of translation beyond early 1982 was not justified.

The Commission understands the rationale for the transition provisions outlined above. Nonetheless, the Commission is concerned about the adequacy of disclosure about the effects of accounting changes.[12] Financial

[7] Successful implementation of SFAS No. 52 requires a fundamental evaluation of the nature of each of a company's foreign operations. Often, this will require input from management personnel involved in various activities within the company. Also, investment objectives with respect to individual foreign operations will need to be reevaluated (e.g., amounts of intercompany accounts considered to be "permanent" advances).

[8] The management's discussion and analysis section may be used for these additional disclosures. The Commission's requirements for Management's Discussion and Analysis of Financial Condition and Results of Operations in Item 303 of Regulation S–K (17 CFR Part 229) are designed to elicit information necessary to an understanding of a registrant's financial statements. This is to be accomplished by providing information enabling an evaluation of the amounts and certainty of cash flows from operations and a registrant's ability to generate adequate amounts of cash to meet its needs for cash (liquidity) as well as an assessment of the impact of events that have had, or may have, a material effect on trends of operating results.

[9] The Commission also believes that a discussion as to the nature of the translation component of equity may assist investors in understanding the reported financial condition. This may be particularly important due to the fact that the Commission's staff has been advised that some analysts and others may be arbitrarily adjusting reported earnings for the translation adjustments. Meaningful disclosure about a company's foreign operations may help to overcome this tendency.

[10] Item 303(a) of Regulation S–K states in part that "where in the registrant's judgment a discussion of segment information or of other subdivisions of the registrant's business would be appropriate to an understanding of such business, the discussion shall focus on each relevant reportable segment or other subdivision of the business and on the registrant as a whole."

[11] Similarly, the functional currency for foreign operations which are experiencing financial difficulties such that additional capital investments may be necessary may also be determined to be the reporting currency.

[12] In several of the annual reports included in the staff's sample, a substantial portion of record (or otherwise increased) earnings was attributable to the adoption of SFAS No. 52. While the 1981 effect of the accounting change was disclosed in the financial statements, information outside the financial statements focused a high level of attention on the strength of the reported results without providing adequate information to permit an evaluation of the comparability of those results particularly since, in each of these cases, the companies did not restate or provide pro forma disclosures.

statement users have a natural tendency to assume that accounting results are prepared using a consistent methodology throughout the reporting period and from year to year. Indeed, users have a right to make that assumption and the trends in reported financial results are a particularly useful indicator of a company's progress. Where accounting results and the trends therein are materially impacted by accounting changes, it is incumbent upon the registrant to clearly bring this fact to the attention of users, together with such other information which may be necessary to enable investors to adequately assess reported results.[13]

For those registrants that adopt SFAS No. 52 in 1982 or thereafter, the Commission believes that, where appropriate, useful information as to comparability can be best provided by restating prior years' financial statements (or making appropriate pro forma disclosures) and by disclosing the effect of the change on results of operations for the current year. However, the Commission understands that, for the reasons considered by the FASB in adopting the transition provisions included in SFAS No. 52, presentation of such information may not always be meaningful (or computation thereof may not be practicable). In such instances, the Commission expects registrants to discuss this fact and the reasons therefor. In this regard, registrants should consider discussing any modifications of operating, financing, or hedging practices which have been effected.

The Commission also believes that registrants that have not yet adopted SFAS No. 52 should discuss the potential effects of adoption in registration statements and reports filed with the Commission.

Codification Update

The "Codification of Financial Reporting Policies" announced in Financial Reporting Release 1 (April 15, 1982) [47 FR 21028] is updated to:

1. Add a new section 501.06, entitled as follows:

§ 501.06 Disclosure Considerations Related to Foreign Operations and Foreign Currency Translation Effects

2. Include in section 501.06 the sections entitled "Background and Discussion," "Disclosure Considerations," and "Disclosures during the Transition Period," identified as specified below:

a. Background and Discussion.

b. Disclosure Considerations.

c. Disclosures during the Transition Period.

This codification is a separate publication issued by the SEC. It will not be published in the **Federal Register** Code of Federal Regulations system.

List of Subjects in 17 CFR Part 211

Accounting, Reporting and recordkeeping requirements, Securities.

PART 211—[AMENDED]

Commission Action:

Subpart A of 17 CFR Part 211 is amended by adding thereto reference to this release (FRR No. 6).

By the Commission.

November 18, 1982.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 82-32363 Filed 11-24-82; 8:45 am]

BILLING CODE 8010-01-M

[13] Item 301 of Regulation S-K [17 CFR 229.301] requires the presentation of certain selected financial data, the purpose of which is to supply in a convenient and readable format data which highlight certain significant trends in the registrant's financial condition and results of operations. The instructions to that item require a description of factors, such as accounting changes, that materially affect the comparability of the information reflected.

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17 CFR Part 240

[Release No. 33-6434; 34-19244; IC-12823]

Purchases of Certain Equity Securities by the Issuer and Others; Adoption of Safe Harbor

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; rule amendments.

SUMMARY: The Commission has announced the adoption of Rule 10b-18 under the Securities Exchange Act of 1934 ("Act") to provide a "safe harbor" from liability for manipulation in connection with purchases by an issuer and certain related persons of the issuer's common stock. The issuer or other person will not incur liability under the anti-manipulative provisions of Sections 9(a)(2) or 10(b) (and Rule 10b-5 thereunder) if purchases are effected in compliance with the limitations contained in the safe harbor. The Commission has also adopted certain amendments to Rule 10b-6 under the Act which will eliminate the Commission's current program of regulating issuer repurchases under that rule. These amendments will except from Rule 10b-6 purchases of an issuer's common stock (and certain related securities) when the issuer is engaged in certain distributions of those securities.

EFFECTIVE DATE: November 26, 1982.

FOR FURTHER INFORMATION CONTACT: John B. Manning, Jr., Esq. (202-272-2874), or Mary Chamberlin, Esq. (202-272-2880); Office of Legal Policy and Trading Practices, Division of Market Regulation, Securities and Exchange Commission, 450 5th Street, N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Commission has considered on several occasions since 1967 the issue of whether to regulate an issuer's repurchases of its own securities.[1] The predicates for this effort have been twofold: first, investors and particularly the issuer's shareholders should be able to rely on a market that is set by independent market forces and not influenced in any manipulative manner by the issuer or persons closely related to the issuer. Second, since the general language of the anti-manipulative provisions of the federal securities laws offers little guidance with respect to the scope of permissible issuer market behavior, certainty with respect to the potential liabilities for issuers engaged in repurchase programs has seemed desirable.

The most recent phase of this proceeding is proposed Rule 13e-2 which was published for public comment on October 17, 1980.[2] This rule would have imposed disclosure requirements and substantive purchasing limitations on an issuer's repurchases of its common and preferred stock. These restrictions, which generally would have limited the time, price, and volume of purchases, also would have been imposed on certain persons whose purchases could be deemed to be attributable to the issuer. In addition, the issuer, its affiliates, and certain other persons

[1] Before its most recent release in October, 1980, issuer repurchases had been the subject of three public rule proposals. The first was a Commission draft of a proposed Rule 10b-10 published in 1967 by the United States Senate in connection with hearings on proposed legislation that became the Williams Act Amendments of 1968. Pub. L. No. 90-439, 82 Stat. 454 (July 29, 1968). Proposed Rule 10b-10 was reprinted in *Hearings on S. 510 before the Subcommittee on Securities of the Senate Committee on Banking and Currency*, 90th Cong., 1st Sess. 214-216 (1967). The Commission then published Rule 13e-2 for comment in 1970 and in 1973. Securities Exchange Act Release Nos. 8930 (July 13, 1970), 35 FR 11410 (1970) and 10539 (December 6, 1973), 38 FR 34341 (1973).

[2] Securities Exchange Act Release No. 17222 (October 17, 1980), 45 FR 70890 (1980) ("October Release").

would have been subject to a general antifraud provision in connection with their purchases of the issuer's common and preferred stock.

The Commission has recognized that issuer repurchase programs are seldom undertaken with improper intent, may frequently be of substantial economic benefit to investors, and, that, in any event, undue restriction of these programs is not in the interest of investors, issuers, or the marketplace. Issuers generally engage in repurchase programs for legitimate business reasons and any rule in this area must not be overly intrusive. Accordingly, the Commission has endeavored to achieve an appropriate balance between the goals described above and the need to avoid complex and costly restrictions that impinge on the operation of issuer repurchase programs.

In light of these considerations, and based on the extensive public files developed in this proceeding, the Commission has determined that it is not necessary to adopt a mandatory rule to regulate issuer repurchases. Accordingly, the Commission has today withdrawn proposed Rule 13e–2,[3] and, as discussed in this release, is amending Rule 10b–6 to eliminate most issuer repurchase regulation under that rule. In lieu of direct regulation under Rule 10b–6 and proposed Rule 13e–2, the Commission has determined that a safe harbor is the appropriate regulatory approach to offer guidance concerning the applicability of the anti-manipulative provisions of Rule 10b–5 and Section 9(a)(2) to issuer repurchase programs. New Rule 10b–18 reflects this determination.[4]

The Commission wishes to stress, however, that the safe harbor is not mandatory nor the exclusive means of effecting issuer purchases without manipulating the market. As a safe harbor, new Rule 10b–18 will provide clarity and certainty for issuers and broker-dealers who assist issuers in their repurchase programs. If an issuer effects its repurchases in compliance with the conditions of the rule, it will avoid what might otherwise be substantial and unpredictable risks of liability under the general anti-manipulative provisions of the federal securities laws.[5] Moreover, since Rule 10b–18 is a safe harbor rather than a *per se* rule, the Commission believes that the safe harbor should be available to all issuers and their affiliated purchasers and should not be limited in its application to any particular class of issuers, such as those defined in the October Release as "Section 13(e) issuers."

The Commission emphasizes that no affirmative inference should be drawn that bids for or purchases of an issuer's stock by persons to which the safe harbor is not explicitly available, or with respect to securities other than the issuer's common stock, should be made in accordance with the safe harbor. The safe harbor is not intended to define the appropriate limits to be observed by those persons not covered by the safe harbor nor the appropriate limits to be observed by anyone when purchasing securities other than common stock. In addition, the safe harbor is not the exclusive means by which issuers and their affiliated purchasers may effect purchases of the issuer's stock in the marketplace. Given the greatly varying characteristics of the markets for the stock of different issuers, there may be circumstances under which an issuer could effect repurchases outside of the guidelines that would not raise manipulative concerns. This is especially the case in the context of the uniform volume guidelines, which cannot easily reflect those varying market characteristics. As discussed more fully below, the Commission wishes to continue to receive the views of any interested persons on whether additional disclosure by the issuer concerning the repurchase program should affect the percentage level of purchases that would be covered under the safe harbor. In order to make it clear that Rule 10b–18 is not the exclusive means to effect issuer repurchases, paragraph (c) of the rule provides that no presumption shall arise that an issuer or affiliated purchaser has violated Section 9(a)(2) or Rule 10b–5 if the purchases do not meet the conditions of paragraph (b).

The remaining parts of the release describe Rule 10b–18 and the amendments to Rule 10b–6 and contrast those provisions to the proposals in the October Release. Interested persons should refer to the October Release for a more detailed discussion of the general background of the Commission's consideration of issuer repurchase programs. In addition, interested persons may wish to refer to a release that the Commission recently issued proposing for comment several amendments to its trading practices rules, including Rule 10b–6.[6]

II. Safe Harbor Rule 10b–18

A. Coverage of Rule 10b–18

The safe harbor of paragraph (b) is available for any bid or purchase that constitutes a "Rule 10b–18 bid" or a "Rule 10b–18 purchase," as defined in the rule. Paragraph (a)(3) defines a Rule 10b–18 purchase as a purchase of common stock of an issuer by or for the issuer or any affiliated purchaser of the issuer. Paragraph (a)(4) defines a Rule 10b–18 bid as a bid for securities that, if accepted, or a limit order to purchase securities that, if executed, would result in a Rule 10b–18 purchase.[7]

B. General Antifraud Provision

Under paragraph (b) of proposed Rule 13e–2, a class of issuers defined as "Section 13(e) issuers," their affiliates, affiliated purchasers, and any broker, dealer, or other person acting on behalf of these issuers, affiliates, or affiliated purchasers would have been subject to a broad general antifraud and anti-manipulative prohibition in connection with any bids or purchases of any equity security of the issuer. The commentators that addressed this provision opposed its adoption for essentially two reasons. First, they argued that it was unnecessary in view of existing provisions of the Act such as Section 9(a)(2) and Section 10(b) and Rule 10b–5 thereunder. Second, they argued that the general nature of paragraph (b) would detract from the certainty otherwise provided by the rule.

[3] Securities Exchange Act Release Nos. 33–6435, 34–19245, IC–12824 (November 17, 1982).

[4] In view of the fact that the provisions of the safe harbor afforded by Rule 10b–18 are substantially similar to the provisions of proposed Rule 13e–2 that would have been imposed on a mandatory basis and for which there has already been substantial public comment, the Commission has determined that further notice and comment are not necessary. *See* n.1, *supra*.

[5] Paragraph (b) of the rule provides that any issuer and its affiliated purchasers could not be held liable under the anti-manipulative provisions of Section 9(a)(2) of the Act or Rule 10b–5 under the Act solely by reason of the number of brokers or dealers used, and the time, price, and amount of bids for or purchases of common stock of the issuer, if such bids of purchases are effected in compliance with all of the conditions of paragraph (b) of the rule. Of course, Rule 10b–18 is not a safe harbor from violations of Rule 10b–5 which may occur in the course of an issuer repurchase program but which do not entail manipulation. For example, Rule 10b–18 confers no immunity from possible Rule 10b–5 liability where the issuer engages in repurchases while in possession of favorable, material non-public information concerning its securities.

[6] Securities Exchange Act Release No. 18528 (March 3, 1982), 47 FR 11482 (1982) ("Trading Practices Release").

[7] The definition of a Rule 10b–18 purchase excludes certain transactions that were never intended to be the subject of regulation under an issuer repurchase rule. Some of these transactions were those enumerated in paragraph (f) of proposed Rule 13e–2. In view of the changed regulatory approach reflected in the rule and its more limited coverage, some of the excepted transactions of proposed Rule 13e–2(f) have been deleted in the adopted rule.

The Commission has reconsidered the question of whether a general antifraud provision is necessary in this context and has concluded that it is not. The sole purpose of the rule as adopted is to provide a safe harbor from liability under the anti-manipulative provisions of the Act. For that reason, the Commission has determined not to include a general antifraud provision in Rule 10b–18.

C. Disclosure

Proposed Rule 13e–2 would have required issuers and affiliated purchasers that sought to repurchase more than two percent of the issuer's stock during any twelve-month period publicly to disclose certain specified information prior to effecting any purchases of the issuer's stock.[8] In addition, those persons would have been required to disclose the specified information to any exchange on which the stock was listed for trading or to the NASD if the stock was authorized for quotation in NASDAQ.[9]

Most of the commentators that addressed the issue suggested that the disclosure provisions were not necessary in view of the existing requirements of other provisions of the federal securities laws (*e.g.*, Section 10(b) and Rule 10b–5). Other commentators stated that disclosure obligations should depend on the particular facts and circumstances involved. Accordingly, they suggested that *per se* disclosure requirements were not appropirate, and, indeed, might cause persons subject thereto to believe that disclosure of other information was unnecessary. Finally, commentators cited practical compliance problems that might arise, such as determining at the beginning of any twelve-month period whether the issuer would need to purchase more than two percent of its stock to satisfy corporate needs, and the need to periodically update disclosure to reflect material changes.

The proposed disclosure requirements were not intended to be co-extensive with other disclosure obligations. Nevertheless, the Commission is persuaded that the obligation to disclose information concerning repurchases of an issuer's stock should depend on whether the information is material under the circumstances, regardless of whether such purchases are made as part of a program authorized by a company's board of directors or otherwise. The Commission has therefore determined not to adopt the specific disclosure requirements contained in paragraph (d) of proposed Rule 13e–2, even as a safe harbor. Other relevant provisions of the federal securities laws and existing policies and procedures of the various self-regulatory organizations impose disclosure responsibilities that appear to be sufficient to ensure that investors and the marketplace in general receive adequate information concerning issuer repurchases. The Commission emphasizes its belief that timely disclosure of all material information in the context of issuer repurchases may significantly facilitate the maintenance of an orderly market for the issuer's stock.

D. Definitions

Affiliated purchaser. Rule 10b–18 contains a definition of the term "affiliated purchaser" that differs somewhat from the definition of that term as contained in proposed Rule 13e–2.[10] As proposed in Rule 13e–2, the definition of affiliated purchaser would have included natural persons acting with the issuer for the purpose of acquiring the issuer's securities,[11] as well as persons who controlled the issuer's purchases, or whose purchases were controlled by, or were under common control with, the issuer's purchases.[12] Commentators were critical of the use of the terms "acting with" and "control" because, in their view, those terms are imprecise. Some commentators noted that the use of those terms suggested that all directors and officers of the issuer would be deemed to be affiliated purchasers and therefore covered by the rule notwithstanding the Commission's stated intent to the contrary. In particular, they stated that the "control" standard articulated in paragraph (a)(2)(ii) of proposed Rule 13e–2 could be interpreted to be the same as the historical affiliation standard and therefore would encompass more than the control of actual purchasing activity that the Commission intended the rule to cover.

The commentators suggested that the "acting with" standard should be changed to an "acting in concert" standard since the latter has particular legal significance. Commentators also suggested that the class of persons defined in proposed paragraph (a)(2)(ii) as affiliated purchasers should be limited to persons that have day-to-day responsibility for the issuer's purchases. In addition, commentators recommended the addition of a proviso in the definition that would specifically except purchases by officers or directors unless they otherwise were an affiliated purchaser.

The Commission agrees with the commentators that the concept of "acting in concert" provides more legal certainty than the standard proposed in the October Release. Accordingly, the first part of the definition of affiliated purchaser has been modified to include the "acting in concert" standard instead of the "acting with" standard.[13] The Commission believes that the "acting in concert" standard will cover the same persons as proposed Rule 13e–2 was intended to cover, including persons acting with the issuer in purchasing the issuer's securities, regardless of whether the purchases are made for the account of the issuer itself.[14]

As adopted, the second clause of the definition of affiliated purchaser covers any affiliate that, directly or indirectly, controls the issuer's Rule 10b–18 purchases, or whose purchases are controlled by, or are under common control with, those of the issuer.[15] Under this formulation, a person would not be considered to be an affiliated purchaser unless the person is an affiliate [16] and one of the three control standards is met.[17]

Finally, to provide further guidance in the definition of affiliated purchaser, the Commission has added a proviso that states, in part, that an officer or director that participates in a decision to authorize the issuer to make or effect Rule 10b–18 bids or purchases will not be considered to be an affiliated purchaser on that basis alone.[18]

The definition of affiliated purchaser as proposed in Rule 13e–2 also would have included affiliates who controlled the issuer by means of ownership of the issuer's securities, and affiliates that were not natural persons.[19] The

[8] Proposed Rule 13e–2(d)(1).

[9] Proposed Rule 13e–2(d)(2).

[10] The definition is similar to the definition of affiliated purchaser recently proposed to be added to Rule 10b–6. *See* Trading Practices Release, 47 FR at 11488.

[11] Proposed Rule 13e–2(a)(2)(i).

[12] Proposed Rule 13e–2(a)(2)(ii).

[13] Rule 10b–18(a)(2)(i).

[14] *See* October Release, 45 FR at 70895, note 30.

[15] Rule 10b–18(a)(2)(ii).

[16] The term "affiliate" is defined in paragraph (a)(1) of the rule.

[17] The determination of whether the affiliate controls the issuer's purchases of its securities, or whether its purchases are controlled by, or are under common control with, the issuer's purchases, would have to be made by the issuer or the other persons involved in the transaction. The Commission is of the view that in most cases paragraph (a)(2)(ii) will cover, among other things, purchases of a parent-issuer's stock by its subsidiaries, and purchases of a subsidiary-issuer's stock by the parent regardless of whether the purchases are made for the account of the subsidiary-issuer itself.

[18] Rule 10b–18(a)(2)(ii).

[19] Proposed Rule 13e–2(a)(2) (iii) and (iv).

commentators were critical of the application of the rule to these affiliates in the absence of any evidence of concerted activity or control over the issuer's purchases of its securities. The Commission agrees that paragraphs (a)(2) (iii) and (iv) as proposed could be overly broad, in the context of a safe harbor or mandatory rule, in light of the rationale underlying the affiliated purchaser concept. Accordingly, it has determined not to include in Rule 10b–18 paragraphs (a)(2) (iii) and (iv).[20]

Trading Volume. The term trading volume has been adopted in paragraph (a)(11) of Rule 10b–18 with some modification from the term as proposed in Rule 13e–2. Generally, the term defines trading volume as the average daily trading volume over the preceding four weeks. This calculation would then be used in the context of the volume provisions of the Rule, which provide a safe harbor for daily purchases of up to 25% of the trading volume.

Proposed Rule 13e–2 would have required that the issuer subtract from the trading volume figure all "Rule 13e–2" purchases by or for the issuer or an affiliated purchaser.[21] The rationale for the exclusion was to assure that the trading volume figures used to calculate the permissible volume of issuer purchases reflected only transactions effected by persons other than issuers or affiliated purchasers. Some commentators stated that the computations required to determine the amounts to be excluded would impose a substantial compliance burden on issuers, affiliated purchasers and broker-dealers that would be disproportionate to the benefits sought to be achieved by requiring the exclusion. In addition, commentators argued that, because of the volume limits, the permissible volume of Rule 13e–2 purchases would not be increased significantly if Rule 13e–2 purchases were included in the calculation of the average trading volume figure.

The Commission generally agrees that compliance with the volume conditions would prevent any significant increase in the permissible volume of purchases that could result from including Rule 10b–18 purchases in less than block size in the trading volume figure. The inclusion of block purchases by the issuer, however, in calculating trading volume could significantly increase the amount of stock that could be purchased within the volume limitations of the safe harbor. Accordingly, the definition of trading volume as adopted in Rule 10b–18 would require the issuer or affiliated purchaser to subtract block purchases that are made by for the issuer or affiliated purchaser from the trading volume figure.

Block. The Commission has considered two alternative definitions of the term "block."[22] The significance of the term is that purchases of blocks are excepted from the volume conditions. Thus, an issuer that chooses to comply with those conditions may purchase up to 25% of the trading volume, and, in addition, may purchase one or more blocks, as defined. The amount of securities purchased in block size need not be included in determining whether the 25% limitation had been reached. The Commission has adopted the simpler of the two definitions. Paragraph (a)(14) of Rule 10b–18 defines a block as that amount of stock that has an aggregate purchase price of not less than $50,000 and, if the aggregate purchase price is less than $200,000, a number of shares that is not less than 5,000.

The Commission has considered whether to require the issuer to exclude, in calculating the amount of securities that would constitute a block (i) any amount of securities that a broker or dealer had assembled or accumulated for the purpose of sale or resale to the issuer or to any affiliated purchaser, and (ii) any amount that a broker-dealer had sold short to the issuer or to an affiliated purchaser if the issuer or affiliated purchaser knew of had reason to know that the sale was a short sale.

Some commentators suggested that the issuer should be required to exclude from a block only those shares that a broker or dealer had accumulated as principal with the purpose of sale or resale to the issuer or affiliated purchaser. In their view, a broader exclusion would impede normal block trading practices, since a broker could not assemble a block on an agency basis and then cross it as such on an exchange. The commentator suggested that this kind of transaction would not have adverse market impact, or present the opportunity for circumvention of the volume limitations, that led the Commission to propose this part of the block definition.[23] The Commission agrees with the commentators that these concerns arise only where broker-dealers accumulate blocks as principal for the purpose of sale or resale to the issuer or affiliated purchasers, and the definition of the term block reflects that judgment.[24]

Certain commentators also suggested that the "know or have reason to know" standard that was proposed to apply in determining whether to exclude from an amount of securities that otherwise would constitute a block broker-dealer's short sales to the issuer should also apply in determining whether to exclude shares accumulated for the purpose of resale to the issuer. The Commission has modified the proviso accordingly.

E. Purchasing Conditions

In order to take advantage of the safe harbor provided by Rule 10b–18, an issuer or affiliated purchaser would have to comply with all of the conditions of paragraph (b) of the rule.[25]

1. *Timing conditions.* The conditions that relate to the timing of purchases have been adopted, for purposes of the Rule 10b–18 safe harbor, substantially as they were proposed in Rule 13e–2. For a transaction in a NASDAQ security, otherwise than on an exchange, there need only be an independent bid currently reported in Level 2 of NASDAQ.[26] For exchange traded securities, if the Rule 10b–18 purchase is to be effected on an exchange, the transaction cannot be the opening transaction for the security on such exchange, and the transactions cannot be effected during the one-half hour before the scheduled close of trading on that exchange.[27]

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[20] Whether affiliates that are not natural affiliates or are affiliates by virtue of their stock ownership would be affiliated purchasers under the rule depends on the facts and circumstances of each case. Nevertheless, the Commission is of the view that exercise of controlling influence by such an affiliate over the corporate matters of the issuer in general may give rise to a presumption that it controls purchases by the issuer. In addition, depending on the facts and circumstances, such affiliates could be deemed to be acting in concert with the issuer in connection with their purchases of the issuer's security. *See also* note 16, *supra.*

[21] Proposed Rule 13e–2(a)(13).

[22] See Proposed Rule 13e–2(a) (16A) and (16B). Commentators generally supported adoption of the simpler definition that was proposed in the October Release as an alternative to the "sliding scale" definition initially contained in the 1973 Proposal.

[23] The proviso to the block definition would also have excluded from that definition any amount of securities that the issuer or affiliated purchaser acquired upon the exercise of a listed call option. The Commission has not adopted this provision.

[24] *See* October Release, 45 FR at 70897, n.39. Thus, where a broker-dealer has sold to the issuer or to an affiliated purchaser a block that contained shares accumulated by the broker-dealer as principal for the purpose of resale to the issuer or affiliated purchaser, the transaction would not qualify as a block unless the remaining shares independently would be large enough to constitute a block under the definition. If the issuer had determined to comply with the volume provisions, the other shares which were accumulated would have to be taken into account in determining whether the volume limitation had been reached.

[25] These conditions have been adopted substantially in the same form as in proposed Rule 13e–2, although several liberalizing changes have been made.

[26] Rule 10b–18(b)(2)(iii).

[27] Rule 10b–18(b)(2)(ii).

For transactions in reported securities, the Rule 10b–18 purchase cannot constitute the opening transaction reported on the consolidated tape.[28] Other time restrictions, as proposed in Rule 13e–2, applicable to trading in reported securities have been modified. Proposed Rule 13e–2 would have prohibited persons subject to the time limitations from purchasing a reported security for which the principal market was a national securities exchange during the period commencing one-half hour before the scheduled close of trading in the principal market for the security and ending with the termination of the period in which last sale prices were reported in the consolidated system. Some commentators argued that this limitation might have anti-competitive effects because it would prohibit trading by the issuer and any affiliated purchaser on other exchanges and in the over-the-counter markets for a substantial period of time. Some commentators suggested as an alternative that the trading prohibition should be only in the period within one-half hour of the scheduled close of trading in the market where the transaction was proposed to be effected. Another commentator suggested that trading should be prohibited only during the one-half hour before the termination of the period in which last sale prices are reported in the consolidated system.

The timing conditions in Rule 10b–18 provide that an issuer or an affiliated purchaser may effect, consistent with the safe harbor provisions of the rule, a transaction in a reported security (i) if the principal market for such security is an exchange, at a time other than during the one-half hour before the scheduled close of trading on the principal market, or (ii) if the transaction is to be effected on an exchange, at a time other than during the one-half hour before the scheduled close of trading on the exchange on which the transaction is to be effected, or (iii) if the transaction is to be effected otherwise than on an exchange, at a time other than during the one-half hour before the termination of the period in which last sale prices are reported in the consolidated system.[29] The Commission believes that these limitations, as modified, appropriately resolve the commentators' concerns while achieving the objectives of the time limitations.

2. *Price conditions.* The price conditions have been adopted as published in proposed Rule 13e–2. The price limit for purchases of reported securities would be the higher of the last sale price reported in the consolidated system or the highest independent published bid, as defined in Rule 11Acl–1(a)(9) [§ 240.11Acl–1(a)(9)] under the Act, regardless of the market reporting that figure.[30] The price limit applicable to purchases of exchange traded securities in transactions on an exchange is the higher of the highest current independent bid quotation or the last sale price on such exchange.[31]

The pricing conditions of Rule 10b–18 provide that purchases of a NASDAQ security otherwise than on an exchange may be made at a net price no higher than the lowest current independent offer quotation reported in Level 2 of NASDAQ.[32] Purchases of securities that are neither NASDAQ securities nor reported securities otherwise than on an exchange may be made at the lowest current independent offer quotation ascertained on the basis of reasonable inquiry.[33] In both cases, the purchase price would include any commission equivalent, mark-up, or differential paid to a dealer.[34]

3. *Single broker-dealer limitation.* A condition that the issuer or affiliated purchaser make purchases from or through not more than one broker or dealer on any day has been adopted as proposed. Purchases may be made from any number of broker-dealers in transactions that are not solicited by the issuer or affiliated purchaser. Some commentators suggested that the Commission should define what would constitute a solicitation for purposes of the rule. Whether a transaction has been solicited necessarily depends on the facts and circumstances of each case and must be determined by those who wish to rely on the rule's safe harbor. Although the Commission does not believe it should define the term solicitation, disclosure and announcement of a repurchase program would not necessarily cause all subsequent purchases to be deemed solicited.[35]

4. *Volume conditions.* The volume conditions to the safe harbor are more liberal than those set forth in the October Release. Under Rule 10b–18, an issuer is permitted to purchase up to 25% of the average daily trading volume over the preceding four calendar weeks. Under Rule 13e–2, that number was 15%. The Commission has concluded that a 25% purchasing condition is appropriate in that Commission cases concerning manipulation in the context of issuer repurchases have historically involved conduct outside the conditions of Rule 10b–18, including a volume limitation of 25%.[36] The Commission also recognizes that establishing a uniform condition might be thought to suggest that purchases in excess of the limitations are *per se* manipulative. Accordingly, the Commission has provided in paragraph (c) of the rule that no presumption shall arise that purchases not in conformity with the limitations of the safe harbor violate the anti-manipulative provisions of the securities laws. The rule operates to impose no *per se* volume prohibition on issuer repurchases, and there may be circumstances in which an issuer would be justified in exceeding the volume conditions.[37] Repurchases outside of the safe harbor that are manipulative, of course, continue to be actionable under the securities laws.

F. Purchases on Behalf of Employee and Shareholder Plans

The definition of a Rule 10b–18 purchase contained in paragraph (a) of the rule excludes any purchase effected by or for an issuer plan if the transaction is effected by an agent independent of the issuer.[38] Those purchases are not considered to be attributable to the issuer and, therefore, are not intended to be addressed by the rule. The criteria contained in paragraph (a)(6) of the rule that are used to determine whether the purchasing agent is independent of the issuer are

[28] Rule 10b–18(b)(2)(i)(A).

[29] Rule 10b–18(b)(2)(i)(B)–(D). In the October Release, the time limitations that were proposed for reported securities were separated into one for reported securities for which the principal market was an exchange and one for those reported securities for which the principal market was otherwise than on an exchange. Proposed Rule 13e–2(e)(2) (i) and (ii). In view of the modifications discussed in the text, the rule as adopted contains a time limitation that is applicable to all reported securities.

[30] Rule 10b–18(b)(3)(i).

[31] Rule 10b–18(b)(3)(ii).

[32] Rule 10b–18(b)(3)(iii).

[33] Rule 10b–18(b)(3)(iv).

[34] *See* Rule 10b–18(a)(12).

[35] *See* October Release, 45 FR at 70898, n. 47.

[36] The volume provisions have been modified to make it clear that block purchases and privately-negotiated purchases are not required to be included in computing the 25% daily volume limitation. In addition, the Commission has not adopted that part of the volume limitations in proposed Rule 13ed–2 that would have required the inclusion of securities acquired through the exercise of listed call options when computing the 25% daily volume limitation.

[37] For example, in some situations average trading volume during the preceding four weeks may not be representative of trading volume at the time of the issuer's purchases. Where current trading volume is substantially greater than that during the preceding four weeks, the issuer may be justified in exceeding the twenty five percent limitation.

[38] The terms "issuer plan" and "agent independent of the issuer" are defined in paragraphs (a)(5) and (a)(6) of the rule, respectively.

designed to insulate the market in the issuer's securities from influence by the issuer or an affiliate.

Two changes, however, have been made in paragraph (a)(6) as published in proposed Rule 13e–2. First, to avoid the possible need for various amendments to existing issuer plans, the commentators suggested that both paragraph (a)(6), and the proviso to it, should be drafted in terms of actual use or exercise of control over the agent by the issuer or affiliate rather than the retention of the power to use or exercise such control. The Commission has adopted this suggestion.

The second change to paragraph (a)(6) incorporates a new clause in the proviso. Certain commentators noted that in many issuer plans, particularly those which the issuer administers or allocates shares purchased for the plan to the participants' accounts, the issuer instructs the agent with respect to the amount of shares it is to purchase over a prescribed period of time. The amount to be purchased is determined by a formula set forth in the plan that generally is based on the amount of contributions and the average market price of the security over a prescribed period of time. The new clause in the proviso will permit the issuer to use such a formula to determine the amount of shares to be purchased by the agent without compromising the independence of the agent so long as the issuer or affiliate does not revise the formula more than once in any three-month period.[39]

Certain commentators also suggested incorporating into the rule various interpretive positions concerning independent agents. For example, the Commission stated in the October Release that neither a common directorship between the issuer and the agent nor the issuer's right to remove the agent would by itself constitute control over the agent.[40] In addition, restrictions imposed on the agent otherwise than by the issuer,[41] or which are required by other statutes,[42] would not preclude a determination that the agent was independent. Commentators also suggested incorporating into the rule a provision that would permit the imposition of certain controls if done in "good faith" and without manipulative intent.

As the Commission noted in the October Release, the determination of whether a control relationship exists between the issuer and the agent is a factual one to be made by the issuer.[43] It is not possible to incorporate in the rule or in a release every possible interpretive position concerning independent agents, since the issue of whether a control relationship exists necessarily will depend on the particular facts and circumstances. Accordingly, the Commission has determined not to attempt to further delineate that relationship in Rule 10b–18. Nevertheless, the Commission reaffirms the interpretive positions expressed in the October Release with respect to independent agents.

III. Solicitation of Views: Continuing Review of Issuer Repurchases and Rule 10b–18

The Commission intends to monitor the operation of issuer repurchase programs to determine the effects of Rule 10b–18 on those programs and the market for an issuer's securities. In view of the Commission's ongoing interest in this area, it continues to solicit the advice and views of all interested persons on the effects of Rule 10b–18 and whether the rule can be improved. It has been suggested, for example, that an issuer should have the benefit of a safe harbor where purchases exceed the percentage volume limitation of Rule 10b–18 and additional disclosure is made concerning the repurchases. The Commission is interested in whether dissemination of additional information by an issuer during its repurchase program, perhaps on a daily basis, should affect the availability of the safe harbor. Such information might include a further statement of the purpose and expected duration of the repurchase program, the amount of shares acquired or to be acquired on a particular day and the time of day or time period during the day the purchase or purchases are made or are proposed to be made. Commentators are invited to address the question of whether, if this (or other) information is disseminated in a full and timely fashion, the issuer should be afforded the protections of the safe harbor notwithstanding the fact that its purchases exceed the current twenty five percent limitation. In this regard, the following additional questions may be relevant:

1. When should the information be disclosed (*i.e.*, before or after the shares are acquired)?

2. How should the information be disclosed (*e.g.*, by press release and notification to the exchange on which the securities are registered and listed for trading and to the NASD if the securities are authorized for quotation in NASDAQ)?

3. Would daily disclosure of such information add to or detract from the maintenance of a fair and orderly market for the issuer's stock?

4. Could the information be disseminated in a full and timely fashion that would protect the markets and investors?

5. Can a disclosure requirement be devised, in the context of a rule like Rule 10b–18, that would assure that manipulative practices do not occur or that those who engage in such practices are not insulated from liability?

IV. Amendments to Rule 10b–6

As reproposed for comment in the October Release, an amendment to Rule 10b–6 would have provided an exception from that rule for purchases of securities that were the subject of a "technical" distribution (*i.e.*, the issuer had outstanding securities immediately convertible into or exchangeable for the security to be purchased), provided that the purchases were made in compliance with Rule 13e–2.

The Commission has adopted the amendment with modifications. Paragraph (f) of Rule 10b–6 now provides that the rule shall not apply to bids for or purchases of any security, any security of the same class and series as such security, or any security that is convertible into, or exchangeable or exercisable for, such security, solely because the issuer or a subsidiary of the issuer has outstanding securities that are immediately convertible into or, exchangeable or exercisable for, that equity security. The effect of the amendment is to eliminate the need for an issuer or any person whose purchases would be attributable to the issuer to seek specific exemptive or interpretive relief from Rule 10b–6 to permit purchases of any class of the issuer's stock solely because the issuer

[39] Under the definition of independent agent as modified, the issuer may revise not more than once in any three-month period the basis for determining the amount of its contributions to the plan or the basis for determining the frequency of its allocations to the plan. As proposed, the rule would have permitted the issuer to make these revisions not more than once in any six-month period. That period has been reduced to three months at the suggestion of the commentators who noted that corporate decisions of this nature generally are made on a quarterly basis.

[40] *See* October Release, 45 FR at 70901, n.71.

[41] For example, the Commission's Division of Investment Management requires that purchases with contributions to dividend reinvestment plans be made within 30 days from the date contributions are received by the agent if the plan is not to be deemed an investment company. *See* October Release, 45 FR at 70901, n.73.

[42] For example, trustees for plans subject to the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, generally are required to purchase the issuer's securities at "fair market value" at the time purchases are made. *See* October Release, 45 FR at 70902, n.74.

[43] *See* October Release, 45 FR at 70901, n.71.

is engaged in a technical distribution.[44] Rule 10b–6 continues to apply, however, to purchases of any security that is the subject of any other kind of distribution, any security of the same class and series as that security, or any right to purchase any such security.

The Commission has adopted the second amendment to Rule 10b–6 proposed in the October Release concerning purchases by independent agents. Paragraph (g) now provides that a bid for or purchase of any security made or effected by or for a plan [45] shall be deemed to be a purchase by the issuer unless the bid is made, or the purchase is effected, by an agent independent of the issuer, as that term is defined in Rule 10b–18(a)(6).

V. Certain Findings, Effective Date and Statutory Basis

Section 23(a)(2) of the Act [46] requires the Commission, in adopting rules under the Act, to consider the anti-competitive effect of such rules, if any, and to balance any impact against the regulatory benefits gained in terms of furthering the purposes of the Act. The Commission has considered Rule 10b–18 and the related amendments to Rule 10b–6 in light of the standards cited in Section 23(a)(2) and believes that adoption of the rule and the amendments will not impose any burden on competition not necessary or appropriate in furtherance of the Act. In addition, since proposed Rule 13e–2 was proposed for comment before January 1, 1981, and since additional notice and comment are not necessary for the adoption of Rule 10b–18,[47] the Commission finds that the regulatory flexibility analysis provisions of the Regulatory Flexibility Act[48] are not applicable.

The Commission finds, in accordance with the Administrative Procedure Act ("APA"), 5 U.S.C. 553(d), that the adoption of Rule 10b–18 and the amendments to Rule 10b–6, relieve mandatory restrictions and do not impose other substantive requirements. Accordingly, the foregoing action becomes effective immediately.

List of Subjects in 17 CFR Part 240

Reporting requirements, Securities.

Text of Rule 10b–18 and Amendment to Rule 10b–6

Part 240 of Chapter II of the Code of Federal Regulations is amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. By adding 17 CFR 240.10b–18 as follows:

§ 240.10b–18 Purchases of certain equity securities by the issuer and others.

(a) *Definitions.* Unless the context otherwise requires, all terms used in this section shall have the same meaning as in the Act. In addition, unless the context otherwise requires, the following definitions shall apply:

(1) The term "affiliate" means any person that directly or indirectly controls, is controlled by, or is under common control with, the issuer;

(2) The term "affiliated purchaser" means:

(i) A person acting in concert with the issuer for the purpose of acquiring the issuer's securities; or

(ii) An affiliate who, directly or indirectly, controls the issuer's purchases of such securities, whose purchases are controlled by the issuer or whose purchases are under common control with those of the issuer;

Provided, however, That the term "affiliated purchaser" shall not include a broker, dealer, or other person solely by reason of his making Rule 10b–18 bids or effecting Rule 10b–18 purchases on behalf of the issuer and for its account and shall not include an officer or director of the issuer solely by reason of his participation in the decision to authorize Rule 10b–18 bids or Rule 10b–18 purchases by or on behalf of the issuer;

(3) The term "Rule 10b–18 purchase" means a purchase of common stock of an issuer by or for the issuer or any affiliated purchaser of the issuer, but does not include any purchase of such stock

(i) Effected by or for an issuer plan by an agent independent of the issuer;

(ii) If it is a fractional interest in a security, evidenced by a script certificate, order form, or similar document;

(iii) Pursuant to a merger, acquisition, or similar transaction involving a recapitalization;

(iv) Which is subject to Rule 13e–1 under the Act [§ 240.13e–1];

(v) Pursuant to a tender offer that is subject to Rule 13e–4 under the Act [§ 240.13e–4] or specifically excepted therefrom;

(vi) Pursuant to a tender offer that is subject to Section 14(d) of the Act and the rules and regulations thereunder.

(4) The term "Rule 10b–18 bid" means (i) A bid for securities that, if accepted, or (ii) A limit order to purchase securities that, if executed, would result in a Rule 10b–18 purchase;

(5) The term "issuer plan" means any bonus, profitsharing, pension, retirement, thrift, savings, incentive, stock purchase, stock option, stock ownership, dividend reinvestment or similar plan for employees or security holders of the issuer or any affiliate;

(6) The term "agent independent of the issuer" means a trustee or other person who is independent of the issuer. The agent shall be deemed to be independent of the issuer only if

(i) The agent is not an affiliate of the issuer; and

(ii) Neither the issuer nor any affiliate of the issuer exercises any direct or indirect control or influence over the times when, or the prices at which, the independent agent may purchase the issuer's common stock for the issuer plan, the amounts of the security to be purchased, the manner in which the security is to be purchased, or the selection of a broker or dealer (other than the independent agent itself) through which purchases may be executed;

Provided, however, That the issuer or its affiliate will not be deemed to have such control or influence solely because it revises not more than once in any three-month period the basis for determining the amount of its contributions to the issuer plan or the basis for determining the frequency of its allocations to the issuer plan, or any formula specified in the plan that determines the amount of shares to be purchased by the agent;

(7) The term "consolidated system" means the consolidated transaction reporting system contemplated by Rule 11Aa3–1 [§ 240.11Aa3–1];

(8) The term "reported security" means any security as to which last sale information is reported in the consolidated system;

(9) The term "exchange traded security" means any security, except a reported security, that is listed, or

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[44] Rule 10b–18 supersedes all exemptions from Rule 10b–6 currently in effect that require the issuer or persons whose purchases are attributable to the issuer to make purchases in compliance with the conditions set forth in Appendix C (*See* 2 Fed. Sec. L. Rep. (CCH) § 22,727) solely because the issuer has convertible securities or warrants outstanding.

Several commentators suggested that Rule 10b–6 should be amended to reflect the staff's position concerning issuer repurchases during an offering of securities by affiliates of the issuer on a "shelf" registration statement, and repurchases after the time the issuer has reached an agreement in principle with respect to an acquisition that may involve a distribution of the issuer's stock. Although the Commission has determined not to amend the rule at this time, it has proposed certain changes with respect to these positions. *See* Trading Practices Release, 47 FR at 11489.

[45] The term "plan" is defined in Rule 10b–6(c)(4).

[46] 15 U.S.C. 78w(a)(2).

[47] *See* n.3 *supra.*

[48] 5 U.S.C. 603–04.

admitted to unlisted trading privileges, on a national securities exchange;

(10) The term "NASDAQ security" means any security, except a reported security, as to which bid and offer quotations are reported in the automated quotation system ("NASDAQ") operated by the National Association of Securities Dealers, Inc. ("NASD");

(11) The term "trading volume" means:

(i) With respect to a reported security, the average daily trading volume for the security reported in the consolidated system in the four calendar weeks preceding the week in which the Rule 10b–18 purchase is to be effected or the Rule 10b–18 bid is to be made;

(ii) With respect to an exchange traded security, the average of the aggregate daily trading volume, including the daily trading volume reported on all exchanges on which the security is traded and, if such security is also a NASDAQ security, the daily trading volume for such security made available by the NASD, for the four calendar weeks preceding the week in which the Rule 10b–18 purchase is to be effected or the Rule 10b–18 bid is to be made;

(iii) With respect to a NASDAQ security that is not an exchange traded security, the average daily trading volume for such security made available by the NASD for the four calendar weeks preceding the week in which the Rule 10b–18 purchase is to be effected or the Rule 10b–18 bid is to be made;

Provided, however, That such trading volume under paragraphs (a)(11) (i), (ii) and (iii) of this section shall not include any Rule 10b–18 purchase of a block by or for the issuer or any affiliated purchaser of the issuer;

(12) The term "purchase price" means the price paid per share

(i) For a reported security, or an exchange traded security on a national securities exchange, exclusive of any commission paid to a broker acting as agent, or commission equivalent, mark-up, or differential paid to a dealer;

(ii) For a NASDAQ security, or a security that is not a reported security or a NASDAQ security, otherwise than on a national securities exchange, inclusive of any commission equivalent, mark-up, or differential paid to a dealer;

(13) The term "round lot" means 100 shares or other customary unit of trading for a security;

(14) The term "block" means a quantity of stock that either

(i) Has a purchase price of $200,000 or more; or

(ii) Is at least 5,000 shares and has a purchase price of at least $50,000; or

(iii) Is at least 20 round lots of the security and totals 150 percent or more of the trading volume for that security or, in the event that trading volume data are unavailable, is at least 20 round lots of the security and totals at least one-tenth of one percent (.001) of the outstanding shares of the security, exclusive of any shares owned by any affiliate;

Provided, however, That a block under paragraphs (a)(14) (i), (ii) and (iii) of this section shall not include any amount that a broker or a dealer, acting as principal, has accumulated for the purpose of sale or resale to the issuer or to any affiliated purchaser of the issuer if the issuer or such affiliated purchaser knows or has reason to know that such amount was accumulated for such purpose, nor shall it include any amount that a broker or dealer has sold short to the issuer if the issuer or such affiliated purchaser knows or has reason to know that the sale was a short sale.

(b) *Conditions to be met.* In connection with a Rule 10b–18 purchase, or with a Rule 10b–18 bid that is made by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange, an issuer, or an affiliated purchaser of the issuer, shall not be deemed to have violated Section 9(a)(2) of the Act or Rule 10b–5 under the Act, solely by reason of the time or price at which its Rule 10b–18 bids or Rule 10b–18 purchases are made of the amount of such bids or purchases or the number of brokers or dealers used in connection with such bids or purchases if the issuer or affiliated purchaser of the issuer:

(1) (*One broker or dealer*) Effects all Rule 10b–18 purchases from or through only one broker on any single day, or, if a broker is not used, with only one dealer on a single day, and makes or causes to be made all Rule 10b–18 bids to or through only one broker on any single day, or, if a broker is not used, to only one dealer on a single day;

Provided, however, That

(i) This paragraph (b)(1) shall not apply to Rule 10b–18 purchases which are not solicited by or on behalf of the issuer or affiliated purchaser; and

(ii) Where Rule 10b–18 purchases or Rule 10–b18 bids are made by or on behalf of more than one affiliated purchaser of the issuer (or the issuer and one or more of its affiliated purchasers) on a singe day, this paragraph (b)(1) shall apply to all such bids and purchases in the aggregate; and

(2) (*Time of purchases*) Effects all Rule 10b–18 purchases from or through a borker or dealer

(i) In a reported security, (A) such that the pruchase would not constitute the opening transaction in the security reported in the consolidated system; and (B) if the principal market of such security is an exchange, at a time other than during the one-half hour before the scheduled close of trading on the principal market; and (C) if the purchase is to be made on an exchange, at a time other than during the one-half hour before the scheduled close of trading on the national securities exchange on which the purchase is to be made; and (D) if the purchase is to be made otherwise than on a national securities exchange, at a time other than during the one-half hour before the termination of the period in which last sale prices are reported in the consolidated system;

(ii) In any exchange traded security, on any national securities exchange, (A) such that the Rule 10b–18 purchase would not constitute the opening transaction in the security on such exchange; and (B) at a time other than during the one-half hour before the scheduled close of trading on the exchange;

(iii) In any NASDAQ security, othewise than on a national securities exchange, if a current independent bid quotation for the security is reported in Level 2 of NASDAQ; and

(3) (*Price of purchase*) Effects all Rule 10b–18 purchases from or through a broker or dealer at a purchase price, or makes or causes to be made all Rule 10b–18 bids to or through a borker or dealer at a price.

(i) For a reported security, that is not higher than the published bid, as that term is defined in Rule 11Ac1–1(a)(9) under the Act, that is the highest current independent published bid or the last independent sale price reported in the consolidated system, whichever is higher;

(ii) On a national securities exchange, for an exchange traded security, that is not higher than the current independent bid quotation or the last independent sale price on that exchange, whichever is higher;

(iii) Otherwise than on a national securities exchange for a NASDAQ security, that is not higher than the lowest current independent offer quotation reported in Level 2 of NASDAQ; or

(iv) Otherwise than on a national securities exchange, for a security that is not a reported security or a NASDAQ security, that is not higher than the lowest current independent offer quotation, determined on the basis of reasonable inquiry; and

(4) (*Volume of purchases*) Effects from or through a broker or dealer all Rule 10b–18 purchases other than block purchases

(i) Of a reported security, an exchange traded security or a NASDAQ security, in an amount that, when added to the amounts of all other Rule 10b–18 purchases, other than block purchases, from or through a broker or dealer effected by or for the issuer or any on that day, does not exceed the higher of (A) one round lot or (B) the number of round lots closet to 25 percent of the trading volume for the security;

(ii) Of any other security, in an amount that (A) when added to the amounts of all other Rule 10b–18 purchases, other than block purchases, from or through a broker or dealer effected by or for the issuer or any affiliated purchaser of the issuer on that day, does not exceed one round lot or (B) when added to the amounts of all other Rule 10b–18 purchases other than block purchases from or through a broker or dealer effected by or for the issuer or any affiliated purchaser of the issuer during that day and the preceding five business days, does not exceed 1/20th of one percent (0.0005) of the outstanding shares of the security, exclusive of shares known to be owned beneficially by affiliates.

(c) No presumption shall arise that an issuer or affiliated purchaser of an issuer has violated Sections 9(a)(2) or 10(b) of the Act or Rule 10b–5 under the Act if the Rule 10b–18 bids or Rule 10b–18 purchases of such issuer or affiliated purchaser do not meet the conditions specified in paragraphs (b) (1) through (b) (4) of this section.

2. By revising paragraph (f) of § 240.10b–6, redesignating paragraph (g) thereof as paragraph (h), and adding a new paragraph (g), as follows

§ 240.10b–6 Prohibitions against trading by persons interested in a distribution.

* * * * *

(f) The provisions of this section shall not apply to bids for or purchases of any security of an issuer, any security of the same class and series as such security, or any security immediately convertible into, or exchangeable or exerciseable for, any such security solely because the issuer or a subsidiary of such issuer has outstanding securities which are immediately convertible into, or exchangeable or exerciseable for, such security.

(g) A bid for or purchase of any security made or effected by or for a plan shall be deemed to be a purchase by the issuer unless the bid is made, or the purchase is effected, by an agent independent of the issuer, as that term is defined in Rule 10b–18(a)(6) under the Act.

* * * * *

Statutory Authority

The Commission hereby adopts Rule 10b–18 and the amendments to Rule 10b–6 pursuant to the provisions of Sections 2, 3, 9(a)(6), 10(b), 13(e), 15(c) and 23(a), 15 U.S.C. 78b, 78c, 78i(a)(6), 78j(b), 78m(e), 78*o*(c) and 78w(a).

By the Commission.

George A. Fitzsimmons,

Secretary.

November 17, 1982.

[FR Doc. 82–32367 Filed 11–24–82; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 271

[Docket No. RM 79–76–133 (Colorado-29); Order No. 269]

High-Cost Gas Produced From Tight Formations

AGENCY: Federal Energy Regulatory Commission, DOE

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission is authorized by section 107(c)(5) of the Natural Gas Policy Act of 1978 to designate certain types of natural gas as high-cost gas where the Commission determines that the gas is produced under conditions which present extraordinary risks or costs. Under section 107(c)(5), the Commission issued a final regulation designating natural gas produced from tight formations as high-cost gas which may recieve an incentive price (18 CFR 271.703). This rule established procedures for jurisdictional agencies to submit to the Commission recommendations of areas for designation as tight formations. This final order adopts the recommendation of the Colorado Oil and Gas Conservation Commission that the J Sand Formation be designated as a tight formation under § 271.703.

EFFECTIVE DATES: This is effective November 22, 1982.

FOR FURTHER INFORMATION CONTACT: Leslie Lawner, (202) 357–8511 of Victor Zabel, (202) 357–8616.

SUPPLEMENTARY INFORMATION:

Issued November 22, 1982

The Commission hereby amends § 271.703(d) of its regulations to include the J Sand Formation located in Adams and Arapahoe Counties, Colorado, as a designated tight formation eligible for incentive pricing under § 271.703. The amendment was proposed in a Notice of Proposed Rulemaking by the Director, Office of Pipeline and Producer Regulation on August 17, 1982 (47 FR 36435, August 20, 1982),[1] based on a recommendation by the Colorado Oil and Gas Conservation Commission (Colorado) in accordance with § 271.703(c)(2)(ii) that the J Sand Formation be designated as a tight formation.

Evidence submitted by Colorado supports the assertion that the J Sand Formation meets the guidelines contained in § 271.703(c)(2). The Commission hereby adopts the Colorado recommendation.

This amendment shall become effective immediately. The Commission has found that the public interest dictates that new natural gas supplies be developed on an expedited basis, and, therefore, incentive prices should be made available as soon as possible. The need to make incentive prices available immediately establishes good cause to waive the thirty-day publication period.

List of Subjects in 18 CFR Part 271

Natural gas, Incentive price, Tight formations.

(Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.;* Natural Gas Policy Act of 1978, 15 U.S.C. 3301–3432; Administrative Procedure Act, 5 U.S.C. 553.)

In consideration of the foregoing, Part 271 of Subchapter H, Chapter I, Code of Federal Regulations, is amended as set forth below, effective November 22, 1982.

By the Commission.

Kenneth F. Plumb,

Secretary.

PART 271—[AMENDED]

Section 271.703(d) is amended by adding a new subparagraph (114) to read as follows:

§ 271.703 Tight formations.

* * * * *

(d) *Designated tight formations.*

* * * * *

(114) *The J Sand Formation in Colorado.* RM79–76–133 (Colorado-29).

(i) *Delineation of formation.* The J Sand Formation is located in Adams

[1] Comments on the proposed rule were invited and one comment supporting the recommendation was received. No party requested a public hearing and no hearing was held.